United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket No. 75-2076

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P/S

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA, ex. rel.
JOHN J. PELLA,

Petitioner-Appellant,

—against—

THEODORE REID, SUPERINTENDENT OF ALBION CORRECTIONAL FACILITY,

Appellee.

On Appeal from the United States District Court
Northern District of New York

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

FACTS

This is an Appeal from the denial of the Habeas Corpus petition of John Pella. The Order appealed from was signed by District Court Judge James Foley April 11, 1975.

The Appellant-Petitioner has been confined for several years as a result of conviction for burglary and robbery.

The details of the arrest and identification of John Pella are set forth in the text of this memorandum, and also in previous memoranda before the Court.

QUESTIONS PRESENTED

1. Were the In-Court Identifications the fruit of illegal police action?

   Not answered by the Court below.

2. Were the In-Court Identifications trustworthy?

   Answered yes by the court below.

BRIEF FOR PETITIONER-APPELLANT

INTRODUCTION

Petitioner--appellant contends that in-court identifications were improperly admitted into evidence at his trial. Two separate arguments were advanced to the District Court: (1) The in-court identifications were the fruit of unlawful police action; (2) Grossly suggestive pretrial identification procedures led to the misidentification of Petitioner.

Both of these arguments were denied by the District Court Judge because he believed the in-court identifications were trustworthy, i.e. he found that the witnesses based their in-court identifications on an "independent source" of memory and recognition.

Petitioner will argue that trustworthiness of identification evidence, while a proper consideration on the issue of misidentification, (issue #2, supra) is not a proper ground for refusing to exclude evidence (trustworthy or not) gathered as the fruit of illegal police activity. (issue #1)

Petitioner will further argue that the in-court identifications were not trustworthy. They were a function of suggestive identification procedures, since the witnesses quite clearly did not have a "definite image" of Petitioner--at least not before the police concluded their identification sessions.

I. THE IN--COURT IDENTIFICATIONS WERE THE PRODUCT OF UNLAWFUL POLICE ACTION AND EXPLOITATION.

There was a time when our courts closed their eyes to the means by which the police brought a defendant to court, so long as once there, he was treated fairly. This was the philosophy of Ker v Illinois, 119 US 436, and Frisbie v Collins 342 US 519. Under these cases, due process protection did not commence until the accused entered the halls of justice--never mind that he arrived there the victim of a police kidnapping!

Realization that such illicit police procedure has no place in a government of laws, that the ends do not justify illegal means of law enforcement, led the courts to abandon the Ker--Frisbie attitude.

> Since Frisbie the Supreme Court in what one distinguished legal luminary describes as a "constitutional revolution," see Griswold, The Due Process Revolution and Confrontation, 119 UPaL.Rev. 711 (1971), has expanded the interpretation of "due process". No longer is it limited to the guarantee of "fair" procedure at trial. In an effort to deter police misconduct, the term has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial. See United States v Russell, 411 US 423, 430-431, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973); Mapp v. Ohio, 367 US 643, 81 S.Ct. 1684, 6 L.Ed.2d 694 (1966); Wong Sun v United States, 371 US 471, 83 S.Ct. 407, 9 L.Ed 2d 441 (1963); Silverman v United States 366 US 505, 81 S.Ct. 679, 5L.Ed.2d 734 (1961). Concurrent with these decisions the Ker--Frisbie rule has been criticized and its continued validity repeatedly questioned. United States v Toscanine, 500 F2d 267 (1974)

Exclusionary rules were formulated to discourage unseemly conduct on the part of law enforcement officers. And logically, these rules are applied with an eye to the object they were designed to accomplish: deterrence of improper police tactics. The focus therefore is on the means by which the objected-to evidence was garnered, not on the quality of that evidence.

> At the outset, we find no merit in the suggestion in the Mississippi Supreme Court's opinion that fingerprint evidence, because of its trustworthiness, is not subject to the proscriptions of the Fourth and Fourteenth Admendments. Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. (Emphasis added) The exclusionary rule was fashioned as a sanction to redress and deter over-reaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes. Thus, in Mapp v Ohio, 367 US 643, 655, 6 L Ed 2d 1081, 1089, 81 S Ct. 1684, 84 ALR2d 933 (1961), we held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court. Davis v Mississippi, 394 US 721.
>
> As the Supreme Court has repeatedly made clear, the Exclusionary Rule has nothing to do with fair determination of the guilt or innocence of the accused. It represents a judicially created device designed to deter disregard for constitutional prohibitions and give substance to constitutional rights. United States v Toscanino 500 F2d 267 (1974) at 273-274.

The ultimate question here is not: "were the in-court identifications trustworthy?" It is rather "were the in-court identifications the product of insufferable police conduct?" The Decision of the District Court failed to discriminate one from the other. Thus the question presently posed, the question of police conduct, was passed over by the District Court.

That oversight is no slur on the lower court, for there appears to be a latent ambiguity in the cases regarding the term "independent source". The phrase "independent source" is employed in decisions dealing with trustworthiness of evidence as well as cases dealing with police exploitation. But the cases slight the question: source of what? In one case, it is source of memory; in the other it is source of the evidence. The distinction is vital. As applied to the possibility of taint arising from suggestive identification procedures, independent source means: "Does the witness's recollection spring from sources independent of his pretrial observations of the accused" (i.e. is his recollection trustworthy?)

As applied to evidence sought to be excluded because of improper police conduct, the term "independent source" means: was the evidence garnered "by means sufficiently distinguishable to be purged of the primary taint" See Wong Sun v United States, 371 US 371, 487-488, 83 S.Ct. 407, 417, 9LEd2d 441 (1963).

The name is the same, but the focus differs according to the issue. It is possible to hold that identification evidence, trustworthy because of an independent source of memory, will nonetheless have to be excluded because it was born of unlawful police conduct.

Thus where suggestive identification procedures have made misidentification probable, and where no independent source of recollection can be found, an in-court identification will be excluded because it is not trustworthy. And where it appears that the in-court identification results from the exploitation of unlawful police conduct, such testimony will be excluded (even if it is trustworthy!) in order to deter those who enforce our laws from themselves breaking the law.

All of the foregoing has been taught by this very Court of Appeals in United States v Edmons, 432 F2d 577 (1970).

There as here, the defendant was arrested without probable cause. There as here, the Court was asked to exclude the in-court identifications

because they were the end product of a police exploitation, and also on grounds that the in-court identifications were not reliable.*1

There as here, the lower Court rejected both arguments because it found the identifications trustworthy, i.e. it found an "independent source" of recollection.

> But it (the government) maintains, as it did successfully below, that the agent's in-court identification testimony stands differently in light of the judge's finding that it had an independent origin within the meaning of United States v Wade supra, 388 US at 242, 87 S. Ct. 1926, namely the agents' observation of the four appellant's on the night of the melee. United States v Edmons, 432 F2d 577 (1970) at 582.

The Edmons court said that if the only issue was one of trustworthiness, it would have been constrained to concur with the lower court and find that there was an independent source of recollection supporting the in-court identifications. After reviewing the arguments for and against independent source of recollection, the court expressly noted that the issue of trustworthiness was not the decisive issue.

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(1)
*In Edmons the appellant contended the in-court identifications were not reliable because they were the fruit of a lineup conducted in violation of Wade. See Edmons at page 581.

> But we believe the issue here differs from what would be presented in reviewing the effect of a violation of Wade or even of an impermissibly suggestive identification. United States v Edmons, 432 F2d 577 (1970) at 583.

The court said the focus was police exploitation, according to the dictates or Wong Sun, supra. Then the court held that when the police arrest without probable cause in order to parade a defendant before eye witnesses, and they are successful in securing an identification--which will naturally be re-enacted at trial--exploitation has occurred.

> Here the illegal arrests produced the precise results for which they were designed. When the police, not knowing the perpetrator's identity, make an arrest in deliberate violation of the Fourth Amendment for the very purpose of exhibiting a person before the victim and with a view toward having any resulting identification duplicated at trial, the fulfillment of this objective is as much an exploitation of "the primary illegality" as where a defendant is arrested without probable cause in the expectation that a search or the taking of fingerprints, see Davis v Mississippi, supra, 394 US 721 89 S.Ct. 1394; Bynum v United States, supra, 104 US App. D.C. 368, 262 F2d 465, will yield evidence that will convict him of a crime, and the illegally seized objects or fingerprints are introduced at trial. Edmons at 584.

And since independent source (not in the suggestive-identification-procedure-sense, but in the illegal-fruit-sense) is defined in terms of exploitation (Wong Sun), a finding of exploitation by definition negates the possibility that the evidence was independently produced.*[2]

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(2)
*Wong Sun established the test for determining if evidence was "tainted fruit" or independent of the primary illegality:

> "We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal action of the police. Rather, the more apt questions in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959) Wong Sun v United States, 371 US 471, 487-488 83 S.Ct. 407, 417, 9 L.Ed2d 441 (1963).

In other words, evidence arrived at by police exploitation is tainted fruit; evidence not the result of exploitation is independent, thus free from taint. Where one finds exploitation, one finds tainted fruit--poisoned evidence which has not been rendered harmless by an independent source. It would be a contradiction in terms to hold that there was exploitation, but that an independent source produced the evidence. On this issue the terms are mutually exclusive alternatives, as the quoted portion of Wong Sun makes clear.

Edmons makes it perfectly clear that evidence which has been exploited cannot be saved by a claim of trustworthiness. This is really no more than an application of Davis v Mississippi and renunciation of the outdated Ker-Frisbie notion of due process. In fact, the Court wisely took the trouble to explain that the issue here differs from the issue presented by allegedly suggestive identification procedures:

> We see no inconsistency between our holding with respect to the Fourth Amendment claim and our belief that we would have reached a different conclusion with respect to a violation of Wade if violation there was. Although in Wade the Court said the quoted statement from Wong Sun was "the proper test to be applied," 388US at 241, 87 S.Ct. at 1939, the application must take account of the different characteristics of the two rules. The Government "exploits" an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act. Edmons at 584.

The case presently before the court treads on ground already plowed by this court in Edmons.

The appellant, John Pella, was arrested in blatant violation of the Fourth Amendment. Not one scintilla of incriminating information was in the hands of the arresting officers; nothing whatever that would link Pella to the crime in Rome. The District Court Judge correctly observed:

> Trooper Dillon had no personal knowledge of any crime nor evidently was he told of any in the radio communication. He did not have any independent basis to make the arrests, as for example, evidence of a crime in plain view; nor was there sufficient information relayed in the radio message to furnish adequate support to arrest. (Page 4 of the District Court Decision.)
>
> Again speaking in terms of the information contained in the record of this trial, no indication of probable cause is evident on the part of Trooper Risley or any other officers. (emphasis added, Page 5 of the District Court Decision.)

The motive for the arrest is apparent: to exhibit Pella to eyewitnesses with a view toward having any resulting identifications vindicate their action; and to have such identifications duplicated at trial.*[3]

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(3)
*As will be seen in Point II, the police did not leave the identification of Pella to chance. The identification procedures themselves assured an "identification". And of course, the police had a vested interest in having Pella identified. Imagine their predicament, having arrested a citizen at gun point, if the eyewitnesses failed to make an identification!

This plainly was the motive. The total lack of probable cause together with the fact that appellant was almost immediately exhibited -- suggestively exhibited !-- to eyewitnesses leaves no room for doubt.*[4]

The Edmons Court called this sort of thing, (arresting on the chance that someone will recognize the "catch") exploitation.

The case here is even stronger. Edmons admitted that he was present at the scene of the crime, that he was a member of a mob, members of which assaulted FBI agents. Appellant steadfastly maintains that he was nowhere near the scene of the crime.

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(4)
*The common sense of the matter tells us what the police hoped to accomplish. But if a principle of law is needful, the handiest is the oft-cited maxim: one intends the natural consequences of his voluntary acts. Here, the police intentionally arrested without the slightest justification, intentionally exhibited appellant to potential identification witnesses, and as we shall see, intentionally did their best to assure that appellant would be identified. And obviously they intended to have resulting identifications duplicated at trial. (continued)

Impelling other evidence of Edmon's guilt was developed:

> "At one point defendant Edmons made a motion as if to draw a gun, and agent O'Brien drew his in response. In doing this he released his hold on Reggie Oliver who struck him, broke loose and escaped into the crowd. He was last seen walking off with his wife, his sister-in-law and others.
>
> A few moments later agent Mulhall returned with the police. Rasheed and Edmons were arrested then and Hamp arrested then or shortly thereafter. A holster and a pouch of bullets were found on Edmons and a revolver was located in the rear seat of the police car. Edmons at 578.

Appellant was arrested even though he had no weapon, and possessed no other evidence of guilt whatever.

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(4)*continued
Since police officers are not going to testify that they intended to violate a defendant's constitutional rights, the real purpose of the arrest will have to be discerned inferentially. I suggest that the "quantum of probable cause information" as a fair barometer; if a legitimate cause for arrest can not be found, one may reasonable infer an illegitimate motive. The inference grows irresistible where as here, the police act as if they were in fact inspired by ulterior motives.

In Edmons, the claim was made that a line-up was conducted in violation of the Wade prescriptions. Absence of counsel only raises the possibility (an unacceptable possibility to be sure) of suggestibility regarding the conduct of the line-up.

Here the police conducted a whole series of identification procedures which were unmistakably suggestive, and which clearly must have influenced the witnesses. But this is the argument developed in Point II. For now it is only necessary to note that the element of actual suggestibility, absent in Edmons, is present in this case. It is a factor of aggravation, not attenuation; a factor which should be considered on the issue of exploitation.

Respondents will doubtless contend that the appellant was arrested in good faith.

It is an open question whether identification evidence garnered by means of exploitative police action (e.g. suggestive identification procedures) following an illegal but good faith arrest would have to be excluded. *5

There is a direct correlation between the amount of probable cause and the amount of "good faith" one can impute to an illegal arrest. Where, as here, there is no justification whatever for the arrest, I fail to see how a claim of good faith can possibly be upheld.

But, the Respondents will reply, the identifications of Appellant would inevitably have been obtained through lawful sources of information

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(5)
*"We are not obliged here to hold that when an arrest made in good faith turns out to have been illegal because of lack of probable cause, an identification resulting from the consequent custody must inevitable be excluded". Edmons at p 584.

even if the illegal arrest had never taken place. This is the "Inevitable Discovery" exception to the exclusionary rule.*[6]

This exception is noted in Edmons:

> "But in a case like this where flagrantly illegal arrests were made for the precise purpose of securing identifications that would not otherwise have been obtained, nothing less than barring any use of them can adequately serve the deterent purpose of the exclusionary rule." Edmons at P 584.

If the government would not have inevitable been able to identify Edmons, admittedly at the scene of the crime in plain view of several FBI agents and numerous onlookers, surely it would not have been able to lawfully secure the identification of Pella. Obviously the police had several "leads" that could have beer followed in a legitimate way, and which would ultimately have lead to Edmons.

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(6)
* See Killough v United States, 336 F2d 929 (D.C. Cir. 1964); Wayne v United States, 318 F2d 205 (D.C. Cir.), cert, denied, 375 US 860 (1963); Sullivan v United States, 219 F2d 760 (D.C. Cir. 1955)

If these leads provided probable cause (e.g. a member of the crowd implicated Edmons) an arrest could have been legally effected, and identification procedures undertaken. One can see how Edmons et al could have been inevitably identified, yet the court would not permit the exception. A fortiori, an exception cannot be allowed here, where the police were without leads which would have lead to Pella.*[7]

It has been pointed out that it is not a simple task for the government to show that it could have lawfully procurred the evidence without benefit of their illegal act "since such act did in fact occur and further did in fact produce the evidence". Maguire, How to Unpoison the Fruit,

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(7)
* The Respondants will answer that the two men who ultimately identified Pella would have described him, or would have picked him out of a "mug-book". Once identified, he would have been legally arrested. The problem with this is threefold: The Edmons Court rejected a stronger "inevitable discovery" argument; the vagaries encountered in applying the doctrine to a situation that never happened; and the fact that the "leads", when actually confronted face-to-face with Pella, could not identify him.

The Fourth Amendment and the Exclusionary Rule, 55 J. Crim. L.C. and P. S., 307, 317, (1964) *[8]

This case requires merely that the promise of Edmons be honored; that the police will not be permitted to take advantage of an unmitigated violation of the Fourth Amendment. This court realized in Edmons, as the Supreme Court has noted, that once an identification is made out-of-court, it is virtually certain that it will be automatically duplicated at trial. The artificial separation between the out-of-court and the in-court identifications, indulged by the District Court, is completely at odds with Edmons.

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(8)

*The same commentator points out that a literal reading of Wong Sun requires that the whole doctrine of "inevitable discovery" be rejected. In view of the nebulous nature of the inquiry necessitated by the doctrine, and in view of Davis v Mississippi (illegally obtained fingerprint evidence was excluded even though another set of lawfully obtained prints were available), perhaps the court here should pay no more attention to "inevitable discovery" than it paid in Edmons.

Maguire concludes his treatment of inevitable discovery (p.630) by observing:

> "The logic of the "inevitable discovery" has a certain appeal, but it collides with the fundamental purpose of the exclusionary rule. If the Supreme Court adopts the inevitable discovery exception, it will mark a sharp bread with Silverthorne, Nardone, and Wong Sun. The preservation of the exclusionary rule as a viable deterrent to illicit police activity requires the spotlight to focus "on actualities not probabilities." citing United States v Paroutain, 299 F2d 486, 489 (2d Cir. 1962).

II THE IN-COURT IDENTIFICATIONS WERE NOT TRUSTWORTHY

Appellant's pre-trial motion for a Stovall v Denno (388 US 293) type due process hearing was denied without prejudice to a renewal during trial. See: Judge Walsh's September 23, 1968 order, filed October 2, 1969. However, when renewed during trial, the Court summarily denied the motion (p.448). The Court then permitted witnesses Thomas Alder and Thomas Rees to make in-court identification of Petitioner without first determining whether they were, pursuant to Stovall, "tainted by procedures that were impermissibly suggestive and condusive to the substantial likelihood of irreparable misidentification."

The District Attorney argued successfully to the lower court that denial of the due process hearing did not cause prejudice. I addressed that argument in a supplemental memorandum of law:

A. The District Attorney assures us that the lineup was fair to petitioner. His reasons are:

1. Petitioner was represented by counsel; therefore, he was not entitled to a Wade hearing.

   This is a response to an argument no where advanced on petitioner's behalf. Petitioner challenges the basic fairness of identification procedures, including, but not limited to, the lineup. He requested a Stovall-type due process hearing so that this argument could be developed. Such a hearing was twice denied by the Trial Court.

2. A hearing on the issue of identification was accorded to a co-defendant.

   Does the District Attorney seriously believe that compliance with the constitutional rights of a co-defendant justifies the violation of petitioner's constitutional guarantees?

   The circumstances surrounding the arrest and identification of petitioner are significantly different from Rinaldi's arrest and identification. Petitioner's presence at Rinaldi's hearing means nothing. Neither the Attorney General nor the District Attorney have argued that the lineup was fairly constituted. (page 10 Supplemental Memorandum of Law)

But the decision of the District Court sidestepped the issue:

"Judge Walsh found that the lineup was not unnecessarily suggestive and held further hearings on petitioner's challenges, and those of co-defendant Centollella (R 336-344, 420-450)"
Pg 7 of the District Court's Decision.

The fact is that Judge Walsh found that the lineup was not unnecessarily suggestive as to Rinaldi; he refused to even consider whether the lineup was suggestive as to Pella!

The testimony cited by the District Court deals only with whether or not appellant was represented by counsel at the lineup.*[9]

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(9)
*The trial court rejected Appellant's Wade argument after a hearing. He also rejected his request for a due process hearing, apparently under the impression that it would be superfluous in light of a co-defendant's Wade hearing. Unfortunately, the trial judge did not appreciate the difference, (see pages 445-449) between a Wade hearing, and a due process hearing held under the auspices of Stovall.
The District Court seems to agree that the Wade hearing of a co-defendant was sufficient to resolve questions of due-process that could have been raised on behalf of Pella. As will be developed, the lineup in fact was suggestive as to Pella. The point here is simply that the issue was summarily decided by the trial court, without a hearing, without even receiving oral argument on the matter.

A. THE IDENTIFICATION PROCEDURES WERE IMPERMISSIBLY SUGGESTIVE

We must focus first on the possible suggestibility of the identification procedures. In doing so, we are admonished to consider the "totality of circumstances" which may, taken together, improperly suggest to the witness those whom the police consider culpable. See: Simmons v United States, 390 US 377 at 384; Stovall v Denne, 388 US 293 at 302, interalia. As Judge Feinberg stated in United States ex rel. Cannon v Montayne 480 F.2d 263 at 267 (2d Cir. 1973), the test is:

> "...extremely general and in each case one must examine the totality of circumstances to determine whether the challenged procedures infringed Constitutional rights. See e.g. Neil v Biggers, 409 US 188; Stovall v Denne, supra; United States ex rel. Gonzales v Zelker 477 F. 2d 799 (2nd Cir. 1973)."

The circumstances surrounding the "identification" of Appellant are therefore of fundamental importance, especially since this is a "pure

identification" case, i.e. the only link between Petitioner and the crime charges is identification testimony.*[10] It is important to remember throughout the discussion on identification procedures that at no time did anyone identify Petitioner as a participant in the crime. Ultimately two people "identified" Appellant as the man they had seen in the vicinity of the crime before or after its commission.

Judging from the discussion of suggestive circumstances contained in EYE WITNESS IDENTIFICATION, by Nathan R. Sobel, this case presents a textbook example of improper police procedure. The identification witnesses in this case were exposed to nearly every type of prejudicial technique mentioned in the above treatise. In order of their occurrence these include:

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(10)
*The District Court referred without elaboration to "other corroborative evidence" (page 9 of the memorandum decision). Exactly what "other evidence" the record reveals remains unclear.

(1) Multiple Witness

The record reveals that all the witnesses were assembled together in a room where, for six hours, they discussed the case among themselves (Rees, Pg. 1171; Alder, Pgs. 493 and 494). Later, at a lineup the same witnesses were asked to make an identification. Discussing suggestive identification practices in United States v Rodriquez (363 F. Supp. 499), Judge Cancio observed:

> "These persons were allowed to mingle together... Again this is not the best practice. If there is more than one witness they should be kept segregated and not be allowed to converse with one another" Id at 501.

The dangers inherent in commingling identification witnesses hardly need be explained: A strong-willed witness may talk another witness out of his independent recollection of someone other than the accused; witnesses who disagree on the physical characteristics of the culprit may identify the accused as a "compromise". It's easy to conjure up other circumstances which could prejudice an accused, where witnesses are allowed to compare notes before they are asked to make an identification.

(2) Photo Viewing Prior to a Proper Lineup

While assembled these witnesses were shown photographs of the suspects and were allowed to discuss them (R 1175). The opportunity for an erroneous initial identification grows. One witness, convinced from a mere photograph (rightly or wrongly) of the identity of a particular suspect, could easily contaminate the recollection of the other witnesses with whom he was gathered--before the test of a proper lineup. As noted in EYE WITNESS IDENTIFICATION, once a suspect is in custody, there is no justification for using photo identification. SEE ALSO: United States v ex rel. Gonzales v Zelker, 447 F.2d 799 (2nd Cir. 1973).

(3) Improperly Constituted Lineup

Finally a lineup was held. With the single exception of the suspect Rinaldi, the suspects were short in stature. Instead of being placed with a group of men of approximately the same physique, Appellant was made to lineup with tall police officers. Since it was known that with

the exception of Rinaldi, the actual culprits were short, obviously this procedure effectively narrowed the range of choices, which in turn defeated the very purpose of the lineup: to test a witnesses' recollection when confronted with several feasible choices. Judge Walsh's decision on Rinaldi's Wade hearing in effect establishes that the lineup was suggestive as to Pella. In sharp contrast to the diminutive Appellant, Rinaldi, like the officers who participated in the lineup, is tall. The height factor undoubtedly prompted Judge Walsh to conclude that authorities did not "stack" the lineup with people "whose physical characteristics were reasonable different from Rinaldi." Rinaldi's physique was similiar to the tall officers, therefore, he was not singled out to the witnesses. This finding is of course, implicit confirmation of Appellant's point, since it is impossible for a lineup which is constituted so as to fairly approximate the physique of a tall suspect--such as Rinaldi--to at the same time fairly approximate the physique of a short

suspect--such as Pella. Of course, such "singling out" cannot be countenanced. (Foster v California, 394 US 440; United States ex rel. Bisordi v LaVallee, 461 F.2d 1020 (2nd Cir. 1972); United States v Hines, 455 F.2d 1317 at 1329. SEE ALSO United States ex rel. Conomes v LaVallee, supra, 363 F. Supp. 994 at 1001.

It is noteworthy that the trial prosecutor, Mr. Darrigrand, personally supervised the lineup proceedings, (pg. 62 of the Rinaldi identification-hearing minutes). One is hard put therefore to excuse the gross deviation from proper procedure. The unavoidable fact is that the prosecutor, obviously schooled in the requisites of a fair lineup, choose to disregard the rights of the Appellant.

The selection of those included in the lineup was admittedly fortuitous. (See pg. 50 of the Rinaldi identification hearing transcript). No effort was made to include participants with generally the same physique as Pella. Of course,

since the prosecutor chose to include in the same lineup multiple suspects (two short and one tall), it was inevitable that the lineup was non-representative with regard to at least one suspect.

(4) Multiple Suspects

As noted, the suspects were first shown to the witnesses by means of photographs, which were given to the assembled witnesses prior to the lineup. In the lineup itself, the suspects were placed together for purpose of identification. Given the fact that two short men participated in the robbery, a witness who positively identified one short man in the lineup was likely to identify by association the only other short man in the lineup. (See Lineup Photo, Appendix). As stated in the Rodriquez case supra:

> When a defendant appears in a lineup with other suspects in the same crime, the fact has been held not to be so unfair as to require exclusion of the defendant's identification. But truthfully it is not the best practice, and together with other circumstances may lead a court to understand that a violation of due process may be inherent in a contested lineup. Id at 501.

Two short men of average weight were thought to have been involved in the robbery. Only two short men of average weight were included in the lineup: Centolella, apprehended fleeing from the scene of the crime, and identified with certainity, and Appellant. Nevertheless, Appellant was not identified at the lineup by any of the six eyewitnesses. But the association between Pella and Centolella was implanted, only to surface later when Pella's photograph was singled out for two witnesses.

(5) Uncertainity of Identification

One would expect that a witness who has retained a clear and "definite image" would be able to make an unequivocal identification when confronted with the living image. This is the common-sense rationale that impels consideration of this factor in any determination of suggestibility.

To reconstruct the situation: The eye-witnesses had been gathered together for several hours "piecing together" what had happened, looking at photographs of the very men they were shortly to

see in a lineup. The witnesses had concluded that a "short and slight" man was a participant in the crime (R 1178). Then they saw the lineup, and they saw in that lineup only one short and slight man--John Pella. So the witnesses viewed the lineup; witnesses we are told, who were not swayed by the foregoing procedures; witnesses who steadfastly maintained a "definite image" of John Pella. And what happened when Alder and Rees saw the living image of John Pella? Nothing! No identification, positive or otherwise. Had the "definite image" of Appellant momentarily escaped them at the moment of truth? Isn't it more likely that any "definite image" of Appellant was formed later, when the cumulative effect of the police "identification procedures" took it's toll?

Five other witnesses viewed the lineup and none identified Appellant.

(6) Improper Post Lineup Procedure

Still the police had no identification of Pella; still they could not justify the arrest. Yet Pella was retained in custody.

On Monday, Alder and Rees returned to Police Headquarters, their recollection of Appellant having been apparently revived over the weekend.

On this occassion they were shown photographs of Appellant. On Friday, the day of the crime, they could not identify Pella in person; on Monday they identified him from photos!

Of course there is no excuse for showing photos any time a suspect is in custody and is readily available for identification purposes.

THE SUGGESTIVE IDENTIFICATION PROCEDURES PRECIPITATED THE MISIDENTIFICATION OF APPELLANT

The District Court found that the in-court identifications were "substantial, reliable and independent" of pretrial identification procedures

(see page 7 of the Decision). He found the origin of the in-court identifications were sources of memory which were uncontaminated by any pretrial suggestibility.

As the lower court noted (page 8-9), several factors must be considered on the issue of independent source of memory.*[11]

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(11)
*Judge Foley enumerated five (5) factors (page 8-9 of the Decision):

(1) the identification is credible in terms of the opportunity to view;

(2) the criminal's appearance made a lasting impression;

(3) the identification remained strong;

(4) the witness was subjected to effective cross-examination

(5) the presence of corroborative evidence.

The leading case on "independent source", Neil v Biggers, 409 US 188, refers to five factors, somewhat at variance with the above:

(1) opportunity to view

(2) the witness' degree of attention

(3) accuracy of the witness' prior description

(4) certainty of identification

(5) length of time between the crime and the confrontation. (continued)

An examination of the proper factors leaves no doubt that "independent source", in the sense of trustworthiness, is lacking in this case:

(1) Opportunity to view

Rees, a by-stander, saw three men run diagonally past him toward an embankment. He did not get a look at their faces as they were running:

---

(11) continued

The only factor that seems to coincide with the District Court's version is #1, opportunity to view. Discussion in the text will be confined to the Neil set of variables, which in any case seem a better guide to the determination of independent source.

The District Court's #2 factor, whether the criminals appearance made a lasting impression, is the ultimate question in need of resolution.

Whether or not the identification remained strong (District Court's #3) has more to do with the resoluteness of the witness than with the independence of his recollection. In any case, the Supreme Court has noted on more than one occasion that once an identification has been made, it naturally tends to become stronger with the passage of time.

Whether or not a witness withstood effective cross-examination (factor #4 says more about the witness' stout-heartedness than it does about the existence of independent recollection.

And factor #5 dealing with 'other corroborative evidence' is really an inquiry into "harmless error", not "independent source" of memory.

Q. "Did you also testify yesterday, Mr. Rees, that the first time you got a look at them, they were standing on the embankment?"

A. "Yes." (R 1227) *12

Rees' opportunity to view was fleeting, it was not a view of one person but three persons, and it was far from a face-to-face confrontation.

---

(12)
*Rees later seems to contradict himself:

Q. "And did you look at them as they were running across the street?"
A. "Yes, I did,"
Q. "And were they facing you as they were running across the street?"
A. "Yes, they were." (R 1236)

The net effect of these statements is not necessarily contradictory. Although the men were running past him, they were running diagonally past him; as a result Rees did not get a look at them until they reached an embankment.

So the District Court left a somewhat misleading impression at page 9 of the Decision:

"Witness Rees saw petitioner and two others less than ten (10) feet away running toward him from a distance of seventy feet away (R 1163) during which time these men paused for a time (R 1164)"

Whatever image Rees formed of the men was formed not as a result of seeing them 10 feet away, but as a result of seeing them momentarily at the embankment, some 30 feet away.

Alder, another by-stander, noticed at 8 o'clock in the morning three men walk by the house where he was working as a painter. (R459) The men stopped on a corner, some one hundred and fifty feet (150') distant. Alder could not make out the facial characteristics of the men on the corner (R 482)

Later at about 11:30 A.M. Alder saw three men walk down a driveway adjacent to the house he was painting. He would not say that Pella was one of the men in the driveway (R 484).

It is noteworthy that Alder apparently was able to identify a co-defendant, Centolella, because he saw him not only at 8 A.M., but also later in the morning. (See R 487-488) Alder's identification of Pella therefore was made without benefit of the second sighting, the one that enabled him to identify Centolella. This naturally tends to detract from the quality of Alder's identification.

Alder's opportunity to view the short and slight man amounted to glimpses of three men at considerable distance while he was working.

(2) Witness' Degree of Attention

It is recognized that victims of crimes usually have far greater motivation to retain a "definite image" of their assailant than does a casual by-stander; victims naturally pay more attention! Both Alder and Rees were by-standers.

Rees had no particular motivation to retain an image of the men fleeing from the scene. He watched them only because they were running. (See R 1150 et seq.)

The District Court made much of Rees' testimony that two of the men resembled men he was acquainted with.

> "It is very significant as Rees described it in his testimony that he was uniquely motivated to retain a definite, lasting, and reliable image of petitioner due to the coincidental resemblance of petitioner and one of the co-defendants with two of his friends (R 1232-1234, 2227), as well as Rees' role as a citizen-pursuer of petitioner and his accomplices." (pgs. 9-10 of the Decision)

Since Rees' did not take part as "citizen-pursuer" in the arrest of Pella, and since he did not claim that such role in any way helped to identify Pella, his actions in that regard although commendable, are irrelevant to this case. Secondly, it is fine to say that a witness was particularly motivated to retain an image (for this reason or that), but such an assertion falls flat when the witness fails to make an identification when he is actually confronted with the accused. *[13]

Alder admitted that he paid no particular attention to the men who walked by:

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(13)
* Maybe Rees did not initially identify Pella because of his particular motivation to retain an image of the escaping men. In any case the objective manifestation of one's motivation to remember is an immediate and certain identification. As we will see; Rees' performance upon confrontation with Pella does not reveal that his "particular motivation" was translated into a "definite image" of John Pella.

Q. "Now when they walked by what did you notice about their features, if anything?"

A. "Well I wasn't paying too much attention to them whey they walked by. I never seen them in the area before. I was just curious as to what they were doing there."

3. Accuracy of the witness' prior description

Apparently neither Alder nor Rees was asked to provide a description before they viewed the suspects. There is simply no reference in the record to any prior descriptions.

Failure to require the witnesses to provide a prior description leaves us with no real test of their independent recollection. Thus, the prosecution can not look to this factor to help demonstrate (as is its burden) independent source.

4. Certainty of Identification

Both Rees and Alder viewed photographs of Pella before the lineup. Neither identified Pella.

Both Rees and Alder saw Pella (under highly suggestive circumstances) in the lineup. Neither made an identification!

Rees:

Q. "When you got through with the lineup there was no actual identification made until the following day, is that correct?"

A. "No. After the lineup, I went back upstairs through a different door." *14

Q. "Did you come back the following day?"

A. "I believe the 19th was a Friday. I don't believe I came back the following day, I came back on Monday; that following Monday."

Q. "Is that when you ....

A. "To view the photographs"

Q. "Is that when you viewed the photographs of the lineup?"

A. "Yes." (R 1177)

---

(14)
* He means: "No, there was not an identification." Obviously if he made a lineup identification, he would not have had to return to view photographs of Pella.

Rees finally identified Pella. It took two photographic sessions and one corporeal confrontation, but Rees did finally identify Pella. This is not "certainty of identification"! This is not the response of a witness who, because of a particular motivation to remember, formed and retained a "definite image".

Alder:

> Q. "And did you, at that time, (at the lineup) make an identification of Mr. Pella?"
>
> A. "No Sir, not a positive identification.
>
> Q. "Can you tell us what you mean that you did not make a positive identification?"
>
> A. "I was definitely positive that I couldn't identify him at that time." (R 510)

Surely the respondents do not hope to rely on the "certainty of identification" factor to help them carry their burden of showing independent source!

5. Length of Time Between the Crime and Confrontation

Respondents would due well to emphasize this factor, for admittedly the identifications followed shortly after the crime. Of course it would have been better if the witnesses had made an identification the same day, without any coaxing.*[15]

Out of the five factors mentioned in Neil only one even arguably supports independent source. But the time-lapse alone, will not support a finding of independent source.

The best way to ascertain what "independent source" really means is to review the cases, focusing not on vague terminology, but rather on the facts.

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(15)

* In a way, this length-of-time factor argues against independent source: It is one thing where a witness identifies a suspect shortly after his observation of the culprit; it is quite another situation when a witness can not identify the suspect shortly after his observation of the culprit. Are these not in fact inverse propositions, the first being an argument in favor of independent source, the latter just as convincing an argument against independent source?

We will be looking for a case where: bystanders--not victims--momentarily observed the culprit at some distance--not during the commission of a crime, and not even at a time when they knew a crime had been committed,[16]*--and who were unable to identify the accused just hours after their observations.

Try as they may, Respondents will not find a case where these facts were held to constitute independent source.

Respondents submitted several cases to the District Court in opposition to the petition. My supplemental Memorandum of Law reviewed each, in order to show that cases of independent source bear little resemblance to our case.

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(16)
*Alder's observations, allegedly of Pella, were hours before the crime.
Rees watched the running men not because he knew they were escaping robbers, but because he was curious why they were running. Obviously he did not know anything was amiss until after the men were out of view.

In People v Logan, 25 NY2d 184, the victim observed the robber face-to-face in a well lighted room during the commission of the crime. He gave the police an accurate prior description. Another victim followed Logan to his car and reported the license number to the police, i.e. there was "other corroborative evidence". Also there was a positive identification shortly after the robbery.

In People v Brown, 20 NY2d 238 the victim observed the assailant face-to-face for several hours just before the crime, and face-to-face during it's commission.

In US v Simmons, 390 US 377 five (5) eye witness victims observed bank robbers face-to-face in a well lighted bank during the commission of the crime.

The leading case of Neil v Biggers (supra) sets down some important guidelines. But, phraseology, even the helpful five-point word-test, must be considered in light of the facts. Compare the facts in Neil to this case:

The victim of the crime observed the assailant "directly and intimately" at least twice during an assault, had seen him up to thirty (30) minutes just before the crime, and provided the police with a complete and accurate prior description, and positively identified the suspect upon confrontation. Obviously the victim of rape has a rather more acute "degree of attention" than the casual bystander in our case.

In US v Wilcox, 507 F2d 364, a bank teller--victim, trained to be observant of faces, had ample time to observe the culprit at close quarters, during the commission of the crime.

In US ex Rel. Pierce v Cannon 508 F2d 197, the witness observed the culprits in adequate lighting, was able to provide a prior description which was accurate in nearly every respect, and demonstrated a high level of certainty at the lineup.

The case most nearly like ours is Foster v California , 394 US 440, 89 Sct. 1127, 22 L Ed 2d 402, (1969). The witness failed to identify Foster the first time he confronted him despite a suggestive lineup.

The police arranged further identification sessions.

Finally, the witness identified Foster at a subsequent lineup. Here the witnesses ultimately identified Pella from mere photographs!

The Supreme Court held that the "identifications" were inevitable under the circumstances. The same holding is warranted here.

Respondents are invoted to supply a case where an independent-source of memory is upheld on facts similar to this case. *[17] And even if such a case could be dredged-up, it would stand in obvious contradiction to the guidelines promulgated by the Supreme Court.

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(17)
* By similiar, I mean not a case of robbery, but a case of incorporating: a fleeting look; at a distance; by-stander observers who have no reason to pay particular attention; failure to identify just hours after the observation; failure to render a prior description.

SUMMARY

The in-court identifications owe their very existence to illegal and unwarranted police action. Even if the in-court identifications were trustworthy beyond a shadow of a doubt, they were nonetheless the poison fruit of illicit procedure. Such identifications, reliable or not, must be excluded in order to deter repeat performances by our law enforcement personnel.

As it happens, the in-court identifications were not trustworthy.

They were the inevitable result of coaxing, the quite understandable response of earnest citizens who have been subjected to the subtle and the not-so-subtle suggestions of the authorities.

Respectfully submitted,

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